

WC 06-55

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Petition of Time Warner Cable for)
Declaratory Ruling That Competitive)
Local Exchange Carriers May Obtain)
Interconnection Under Section 251 of)
the Communications Act of 1934, as)
Amended, to Provide Wholesale)
Telecommunications Services to VoIP)
Providers)

Docket No. _____

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Federal Communications Commission
Office of Secretary

PETITION FOR DECLARATORY RULING

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¹ 47 C.F.R. §§ 1.1, 1.2.

VoIP-based service provider. Rather, these commissions have held that only a telecommunications carrier that transmits traffic to or from its own retail end-user customers qualifies to interconnect under the Act. Such rulings—which effectively foreclose Time Warner Cable’s ability to introduce competitive VoIP services in many areas—are squarely at odds with the plain text of the Act and this Commission’s unequivocal precedent. Consumers in South Carolina and Nebraska should not be denied the benefits of a new competitive service offering that most other consumers can enjoy elsewhere. The Commission should issue a declaratory ruling to ensure a consistent national interpretation of the applicable federal law and to remove the entry barrier caused by these state commissions’ clearly erroneous interpretations of the governing law.

In light of the severe competitive impacts caused by the state commission decisions at issue, Time Warner Cable respectfully requests expedited consideration of this petition.

Background

In 2003, Time Warner Cable deployed a facilities-based competitive telephone service branded as Digital Phone using VoIP technology, later expanding the service to each of its 31 local divisions. At the time of its deployment of Digital Phone, Time Warner Cable recognized that the regulatory classification of VoIP-based telephone services was uncertain and was the subject of a rulemaking by this Commission. Therefore, Time Warner Cable, through its various telecommunications carrier affiliates, submitted to state regulations that govern competitive telecommunications services by obtaining state authority to operate as a competitive local and interexchange provider of

telephone service. In fact, Time Warner Cable and its affiliates now are authorized to operate as a competitive LEC in 20 states. In obtaining state authorizations, Time Warner Cable expressly reserved its right to modify its policies in conformity with changes to the legal and regulatory regime applicable to VoIP-based services.²

Time Warner Cable's Digital Phone service has offered a competitive alternative to millions of consumers, and they have responded with great enthusiasm: Time Warner Cable now serves more than one million residential voice customers, with approximately 50,000 new customers signing up each month. Digital Phone has achieved penetrations in local service areas of up to 12 percent in less than two years.³ Consumers reap the rewards from the roll-out of Digital Phone in the form of lower prices, better quality, and more innovative features.⁴

² As a result of the Commission's decision in *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission* (the "Vonage Order"), in which the Commission indicated that state certification and tariffing requirements would be preempted in connection with certain qualifying VoIP-based services offered by cable operators, Time Warner Cable has notified each of the utility commissions in the states in which it operates that it is no longer providing its Digital Phone VoIP-based service pursuant to a CPCN or a retail tariff. See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, 19 FCC Rcd 22404, 22423-24 ¶¶ 31-32 (2004). Nonetheless, Time Warner Cable continues to comply with 911 regulations, state and federal universal service payment requirements, intercarrier compensation regimes, numbering rules, and the Communications Assistance for Law Enforcement Act, among other things.

³ Press Release, Time Warner Inc., *Time Warner Reports First Quarter 2005 Results* (May 4, 2005), available at <http://www.timewarner.com/corp/newsroom/pr/0,20812,1057181,00.html>.

⁴ Digital Phone provides unlimited local, in-state, and long distance calling to the U.S. and Canada, as well as call waiting, caller ID, and additional features for a flat monthly fee. Subscribers can make and receive calls using virtually any commercially available handset, and they have access to toll-free calling, international calling, directory assistance, operator services, and telecommunications relay services. Customers switching to Digital Phone can keep their existing landline telephone numbers and retain or change their current directory listings. Moreover, Digital Phone enables Time Warner

To ensure that its service offers customers the ability to call and be called by end users on the public switched telephone network ("PSTN"), Time Warner Cable generally enters into business relationships with a circuit-switched competitive telecommunications carrier. In nearly all of its service areas, Time Warner Cable has arranged to purchase wholesale telecommunications services from Sprint Communications Company, L.P. ("Sprint") or MCI WorldCom Network Services, Inc. ("MCI"),⁵ thereby permitting Time Warner Cable, where necessary, to receive calls from and deliver calls to subscribers connected to the PSTN. These carriers provide transport necessary for such origination and termination by entering into interconnection agreements with incumbent LECs. Sprint and MCI also assist Time Warner Cable in providing E911-related connectivity; performing local number portability; administering, paying and collecting intercarrier compensation; transporting and terminating long-distance traffic; and providing operator services and directory assistance. Through such arrangements, Time Warner Cable has been able to enter its service areas quickly, without the need to enter into drawn-out negotiations with numerous incumbent LECs and without the need to duplicate already-existing interconnection facilities.

In some states, however, Time Warner Cable has been unable to purchase wholesale telecommunications services from Sprint or MCI because the state commissions have upheld rural LECs' arguments that they are not obligated to enter into interconnection agreements with competitive carriers to the extent that such competitors operate as wholesale carriers. In South Carolina, for example, MCI sought to

Cable to offer customers added value, convenience, and other benefits associated with its combined package of video, high-speed data, and voice services.

⁵ Time Warner Cable's contractual arrangements with MCI have been assigned to Verizon Business by virtue of MCI's recent merger with Verizon.

interconnect with a number of rural LECs (including the Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company). But those LECs took the position that they could not be required to accept traffic from a third-party provider—such as Time Warner Cable—that purchases wholesale telecommunications services from MCI. Rather, the incumbent LECs asserted that they were required to exchange traffic with MCI only insofar as such traffic originated from or terminated to MCI's own retail end users. Ultimately, MCI raised the issue before the PSC in a Section 252 petition for arbitration.

The South Carolina PSC denied Time Warner Cable's request to intervene in that arbitration and ruled against MCI on the merits.⁶ The PSC held that a competitive LEC is not "entitled to interconnection to act as an intermediary for a third party that will, in turn, provide service to end users."⁷ The PSC based on this holding on its belief that, "to the extent MCI seeks to provide service to Time Warner Cable Information Services, LLC ("TWCIS"), or indirectly to TWCIS' end user customers, such service does not

⁶ See *Petition of MCI Metro Access Transmission Services, LLC for Arbitration with Farmers Telephone Cooperative, Inc., Hargray Telephone Company, Home Telephone Co., Inc. and PBT Telecom, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Order Denying and Dismissing Petition to Intervene, Docket No. 2005-67-C (South Carolina PSC May 23, 2005); *Petition of MCI Metro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order Ruling on Arbitration, Docket No. 2005-67-C (South Carolina PSC Oct. 7, 2005) ("*SCPSC Arbitration Order*"). For the Commission's convenience, we are attaching an appendix containing these orders (at Tabs 3 and 8 respectively) and other state decisions cited in this Petition.

⁷ *SCPSC Arbitration Order* at 11.

meet the definition of ‘telecommunications service’ under the Act and, therefore, MCI is not a ‘telecommunications carrier’ with respect to those services.”⁸

The South Carolina PSC further opined that, to the extent MCI provides wholesale telecommunications services to Time Warner Cable or other service providers, it fails to offer telecommunications “‘for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public.’”⁹ The PSC failed to distinguish any of the numerous cases holding that the provision of wholesale telecommunications to a class of service providers constitutes the provision of service to a class of users as to be “effectively available directly to the public.”

In a fall-back theory, the South Carolina PSC specifically targeted VoIP-based services. According to the PSC, even if “it may be appropriate under certain circumstances for a telecommunications carrier to interconnect its facilities indirectly,” the ultimate service provided to the end user must still be a “telecommunications service.”¹⁰ The PSC further stated: “Whether [VoIP] will be classified as a telecommunications service or an information service is currently an open question before the FCC. Unless and until the FCC does classify VoIP as a telecommunications service, VoIP providers do not have rights or obligations under Section 251.”¹¹ Accordingly, in the PSC’s view, incumbent LECs “should not be required to provide

⁸ *Id.*

⁹ *Id.* (quoting 47 U.S.C. § 153(46)) (emphasis in original).

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9 (footnote omitted).

indirectly (through MCI as an intermediary) what they would not be required to provide directly.”¹²

In addition to barring MCI from exchanging traffic with rural LECs on behalf of Time Warner Cable, the South Carolina PSC ruled that the rural LECs have no obligation to port telephone numbers to MCI where the numbers would be assigned to Time Warner Cable’s Digital Phone customers. In the PSC’s view, “[t]here are no rules [pursuant to the Communications Act] requiring these types of ports.”¹³

The South Carolina PSC recently made a nearly identical ruling in an arbitration between MCI and another incumbent LEC, Horry Telephone Company, again resulting in Time Warner Cable being prevented from offering its Digital Phone service to tens of thousands of customers in South Carolina.¹⁴

Additionally, the Nebraska Public Service Commission likewise blocked Time Warner Cable’s entry into rural areas when it upheld rural LECs’ refusals to interconnect with telecommunications carriers such as Sprint and MCI to the extent that those carriers sought to sell wholesale telecommunications services to service provider customers such as Time Warner Cable.¹⁵ The Nebraska PSC concluded: “Sprint has failed to

¹² *Id.* at 17.

¹³ *Id.* at 16.

¹⁴ *Petition of MCI Metro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order Ruling on Arbitration, Docket No. 2005-188-C (South Carolina PSC Jan. 11, 2006) (Tab 11, attached hereto).

¹⁵ The Nebraska PSC had previously approved an interconnection agreement between Sprint and Alltel in Nebraska under which Sprint is currently providing wholesale telecommunications services to Time Warner Cable. As a result of this arrangement, consumers in the Lincoln, Nebraska area are currently enjoying the benefits of residential telephone competition.

demonstrate that it is a ‘telecommunications carrier’ when it acts under its private contract with Time Warner Cable.”¹⁶

By contrast, the public utilities commissions in New York, Illinois, Iowa, and Ohio have recognized the right of telecommunications carriers such as Sprint or MCI to interconnect with the incumbent LEC for the purpose of providing wholesale telecommunications services to a cable operator providing VoIP-based services. In a case involving another cable company customer of Sprint, for instance, the Iowa Utilities Board, although initially ruling that Sprint was not a “telecommunications carrier” entitled to obtain interconnection where it “would have no direct relationship with any end-user whose traffic would be exchanged under the proposed interconnection agreements,”¹⁷ later rescinded that decision voluntarily after Sprint filed an appeal in federal court.¹⁸ Similarly, the Illinois commission has ruled that Sprint is entitled to interconnect with rural LECs because it sells wholesale services to a cable customer of Sprint on a common-carrier basis.¹⁹ These commissions correctly recognize that the

¹⁶ *Sprint Communications Company L.P., Overland Park, Kansas, Petition for Arbitration under the Telecommunications Act, of Certain Issues Associated with the Proposed Interconnection Agreement between Sprint and Southeast Nebraska Telephone Company, Falls City, Findings and Conclusions, Application No. C-3429, ¶ 21* (Nebraska PSC Sept. 13, 2005) (“*Nebraska PSC Arbitration Order*”) (Tab 7, attached hereto); see also *id.* ¶¶ 25-28.

¹⁷ *Arbitration of Sprint Communications Co. v. Ace Communications Group, et al.*, Order Granting Motions to Dismiss, Docket No. ARB-05-02, at 8 (Iowa Utils. Bd. May 26, 2005) (Tab 4, attached hereto).

¹⁸ *Arbitration of Sprint Communications Co. v. Ace Communications Group, et al.*, Order on Rehearing, Docket No. ARB-05-02, at 14 (Iowa Utils. Bd. Nov. 28, 2005) (“*IUB Reconsideration Order*”) (Tab 10, attached hereto) (“It is clear that Sprint is willing to provide wholesale services to any last-mile retail service provider that wants Sprint’s services in Iowa.”).

¹⁹ See *Cambridge Telephone Company, C-R Telephone Company, El Paso Telephone Company, Geneseo Telephone Company, Henry County Telephone Company, Mid*

Communications Act's definition of a "telecommunications carrier" precludes any distinction between carriers that provide retail services and those that provide wholesale services. They further recognize that telecommunications carriers such as Sprint and MCI qualify for interconnection not only under the plain language of the Act, but also in view of the Act's pro-competitive purposes.²⁰

Other states are considering the same issues,²¹ and the risk of further decisions upholding rural LECs' refusals to interconnect threatens to defeat—or at a minimum

Century Telephone Cooperative, Inc., Reynolds Telephone Company, Metamora Telephone Company, Harrisonville Telephone Company, Marseilles Telephone Company, Viola Home Telephone Company, Petitions for Declaratory Relief and/or Suspensions for Modification Relating to Certain Duties Under §§ 251(b) and (c) of the Federal Telecommunications Act, ALJ Recommendation, Case Nos. 050259, 050260, 050261, 050262, 050263, 050264, 050265, 050270, 050275, 050277, 050298 (Illinois Commerce Comm'n Aug. 23, 2005), available at 2005 WL 2347930 (Tab 5, attached hereto). The commission did so despite the administrative law judge having repeatedly sided with the rural LECs and his advocacy seeking reversal of the commission's position.

²⁰ See also *Petition of Sprint Communications Company L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Inter-carrier Agreement with Independent Companies*, Order Resolving Arbitration Issues, Case 05-C-0170, at 5 (New York PSC May 18, 2005) ("NYPSC Arbitration Order") (Tab 2, attached hereto), review pending, see *infra* n.21; *Application and Petition in Accordance with Section II.A.2.b of the Local Service Guidelines Filed by: The Champaign Telephone Co., Telephone Services Co., the Germantown Independent Telephone Co., and Doylestown Telephone Co.*, Finding and Order, Case Nos. 04-1494-TP-UNC, 04-1495-TP-UNC, 04-1496-TP-UNC, 04-1497-TP-UNC (Ohio PUC Jan. 26, 2005) ("Ohio PUC Arbitration Order"), available at 2005 WL 883671 (Tab 1, attached hereto), *reh'g denied in pertinent part*, Order on Rehearing, Case Nos. 04-1494-TP-UNC, 04-1495-TP-UNC, 04-1496-TP-UNC, 04-1497-TP-UNC (Apr. 13, 2005).

²¹ For example, the issue has been raised in an arbitration proceeding in Texas. See *Petition of Sprint Communications Company L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications Inc.*, Docket No. 31038 (Texas PUC). Additionally, a decision of the New York Public Service Commission permitting Sprint to obtain interconnection from a number of rural LECs under similar circumstances is currently under review in the United States District Court for the Western District of New York. *Berkshire Telephone Corp. v. Sprint Communications Co. L.P.*, Civ. Action No. 05-CV-6502 (CJS) (MWP) (W.D.N.Y. filed Sept. 26, 2005).

significantly delay—the development of telephone competition in such areas. Although several state commissions have correctly held that wholesale carriers such as Sprint and MCI are entitled to interconnect with incumbent LECs for the purpose of selling telecommunications services to other service providers in this manner,²² the conflicting interpretations and apparent confusion among the states warrant prompt intervention by this Commission, particularly in light of the severe anticompetitive consequences of erroneous decisions.²³

Argument

The Act and Commission precedent unequivocally authorize telecommunications carriers such as Sprint and MCI to obtain from incumbent LECs interconnection necessary to provide wholesale telecommunications services to other carriers and to VoIP-based providers. State commissions' recent refusals to uphold this basic right are dealing a substantial blow to residential telephone competition. As illustrated by Time Warner Cable's experience in South Carolina and Nebraska, state commissions' refusal

²² See *supra* at 8-9 & n.20.

²³ In addition to obtaining telecommunications services from Sprint and MCI in order to access the PSTN and provide service to its customers, Time Warner Cable, though its regulated, telecommunications carrier affiliates, has also in some circumstances sought its own interconnection agreements with incumbent LECs. In South Carolina, however, as explained in the Petition for Preemption filed in conjunction with this Declaratory Ruling Petition, the PSC not only refused to authorize MCI to obtain interconnection for the purpose of selling telecommunications services to Time Warner Cable, but also denied a certificate of public convenience and necessity ("CPCN") to Time Warner Cable's telecommunications affiliate. As the Petition for Preemption demonstrates, that denial of a CPCN violates Section 253 of the Act because it precludes Time Warner Cable from itself offering telecommunications services and, in turn, obtaining interconnection agreements for the purpose of doing so. In combination with the PSC's arbitration decisions in the MCI cases, the effect of these orders is to preclude Time Warner Cable from obtaining any type of access to the PSTN—either on its own or through a wholesale telecommunications carrier. The PSC's orders, therefore, result in an insurmountable barrier to entry into the residential telephone market.

to allow requesting telecommunications carriers to interconnect with rural LECs in order to serve customers such as Time Warner Cable—even if ultimately corrected—prevents Time Warner Cable from expeditiously entering certain areas.²⁴

The Commission should promptly grant a declaratory ruling reaffirming that requesting telecommunications carriers are entitled to obtain interconnection with incumbent LECs to provide wholesale telecommunications services to other service providers. As the Commission recently observed, declaratory rulings are appropriate in response to state arbitration decisions that conflict with federal law, because they “help . . . clarify the scope of [the Commission’s] existing rules to settle a controversy and . . . maintain the integrity of the Commission’s national policies.”²⁵ By contrast, if Time Warner Cable were forced to litigate each erroneous state commission ruling independently, its entry into those areas—and the associated consumer benefits—would be significantly delayed, even apart from the inefficiency entailed by proceeding on a state-by-state basis. Accordingly, Time Warner Cable respectfully requests that the Commission consider this Petition on an expedited basis and clarify that interconnection rights under Section 251 of the Act are not based on the identity of the requesting carrier’s customer.

²⁴ This barrier to competition is exacerbated in South Carolina by the PSC’s concomitant refusal to grant Time Warner Cable a CPCN.

²⁵ *BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, 6840 ¶ 20 (2005).

**I. SECTION 251 OF THE ACT AND COMMISSION PRECEDENT
UNEQUIVOCALLY AUTHORIZE TELECOMMUNICATIONS
CARRIERS TO OBTAIN INTERCONNECTION TO EXCHANGE
TRAFFIC ON BEHALF OF THIRD-PARTY SERVICE PROVIDERS.**

Section 251(a) makes plain that all carriers must “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”²⁶

Section 251(b) imposes further duties on all local exchange carriers, including the obligations to provide resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation arrangements for the transport and termination of telecommunications.²⁷ In addition, Section 251(c)(2) specifies that incumbent LECs have “the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.”²⁸ These statutory provisions clearly establish—and the Commission has expressly confirmed—that incumbent LECs must interconnect with competitive carriers such as Sprint and MCI that seek to provide wholesale telecommunications services to third parties such as Time Warner Cable.

When competitive carriers seek interconnection with incumbent LECs in order to provide wholesale telecommunications services to third-party service providers, they indisputably function as requesting telecommunications carriers, because they provide “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and

²⁶ 47 U.S.C. § 251(a)(1).

²⁷ *Id.* § 251(b).

²⁸ *Id.* § 251(c)(2).

received.”²⁹ Offering such transmission to service providers on a wholesale, common-carrier basis satisfies the requirement that this “telecommunications” functionality be *offered “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”*³⁰

State commissions refusing to uphold competitive LECs’ interconnection rights have relied the argument that Section 251 of the Act authorizes interconnection only for telecommunications carriers seeking to provide retail services to end users.³¹ As a long line of precedent establishes, that position is clearly erroneous.

The Commission has repeatedly rejected the argument that the definition of “telecommunications service” (and, in turn, the definition of “telecommunications carrier”) excludes wholesale services provided to other service providers. In the *Non-Accounting Safeguards Order*, based on its analysis of Section 251(c)(4), the Commission concluded that the text and legislative history of the Act indicate “that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services, *which include wholesale services to other carriers.*”³² Similarly, in the first *Universal Service Order* the Commission reaffirmed that telecommunications services “include services offered to other carriers, such as

²⁹ *Id.* § 153(43).

³⁰ *Id.* § 153(46).

³¹ *See supra* at 5-8.

³² *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033 ¶ 263 (1996) (“*Non-Accounting Safeguards Order*”) (emphasis added).

exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.”³³

The Commission has reached precisely the same conclusion in response to the related argument that wholesale carriers that serve other carriers (as opposed to end users) do not meet the statutory requirement of providing service “directly to the public.” Indeed, the Commission has categorically rejected the argument that “wholesale telecommunication services are not offered directly to ‘the public,’ but only to other carriers.”³⁴ The Commission emphasized that “it could find no basis in the statute, legislative history, or FCC precedent for finding the reference to ‘the public’ in the statutory definition to be intended to exclude wholesale telecommunications services. Rather, the Commission concluded that the phrase ‘the public’ was meant only to exclude private carriage services, as opposed to common carrier services.”³⁵

³³ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9178 ¶ 785 (1997) (“*Universal Service Order*”); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15598 ¶ 191 (1996) (“IXCs that offer access services in competition with an incumbent LEC (i.e., IXCs that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2).”) (emphasis added); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Report and Order and Notice of Proposed Rulemaking, CC Docket No 02-33 et al., FCC 05-150 ¶ 91 (rel. Sept. 23, 2005) (“*Wireline Broadband Order*”) (confirming that facilities-based providers of broadband Internet access may offer the underlying transmission service to “both end user and ISP customers” on a common carrier basis—i.e., as a retail or wholesale telecommunications service).

³⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Order on Reconsideration, 12 FCC Rcd 8653, 8670-71 ¶ 33 (1997) (“*Non-Accounting Safeguards Reconsideration Order*”); see also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22032-34 ¶¶ 263-65 (same).

³⁵ *Non-Accounting Safeguards Reconsideration Order*, 12 FCC Rcd at 8670-71 ¶ 33; see also *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22032-34 ¶¶ 263-65 (same); *Universal Service Order*, 12 FCC Rcd at 9178 ¶ 785 (same); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket No. 98-147, 14 FCC Rcd 19237, 12946-47 ¶¶ 18-21 (1999) (concluding that

The Commission's conclusion that "telecommunications service" includes wholesale service provided to other carriers is fully consistent with the D.C. Circuit's longstanding interpretation of the definition of a "common carrier" service.³⁶ For example, in the seminal *NARUC* decisions, the D.C. Circuit held that the requirement of an indifferent offering to *the public* "does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users."³⁷ More recently, in *Virgin Islands*, the court upheld the Commission's determinations that the term "telecommunications service" was "not intended to create a retail/wholesale distinction" and that "neither the Commission nor the courts . . . ha[ve] construed 'the public' as limited to end-users of a service."³⁸ To the extent that state commissions have relied on *Virgin Islands* to support a denial of interconnection to Sprint and MCI, they have badly misconstrued its meaning.³⁹

DSL transmission services sold on a wholesale basis to Internet service providers are "telecommunications services" that are effectively offered directly to the public).

³⁶ See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) (upholding Commission's analysis equating definitions of "common carrier service" and "telecommunications service").

³⁷ *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*"); see also *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*") (same).

³⁸ *Virgin Islands*, 198 F.3d at 930 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22032-34 ¶¶ 263-65).

³⁹ As other state commissions have recognized, transporting third-party traffic (including VoIP service traffic) is not only well within the scope of what "telecommunications carriers" commonly do, it is a logical byproduct of interconnection. See, e.g., *Ohio Arbitration Order*, at *2 (holding that MCI was a "telecommunications carrier" entitled to interconnect to serve third party customers because, in providing such service, "MCI is acting in a role no different than other telecommunications carriers whose network could interconnect with [ILECs] so that traffic is terminated to and from each network and

Nor is there any merit to some state commissions' argument that Sprint and MCI should be denied interconnection because they sell telecommunications to Time Warner Cable on a private-carrier basis, rather than as common carriers. Again, the governing law is clear: If an entity holds itself out as offering "telecommunications" indifferently to a class of users, it falls within the definition of common carrier (or "telecommunications carrier").⁴⁰ As the Commission has recently recognized, absent any legal compulsion to operate as a common carrier, it is ultimately up to the service provider to determine whether it will function as a common carrier or private carrier.⁴¹

Contrary to some state commissions' claims that Sprint and MCI have somehow failed to demonstrate their common carrier status,⁴² those companies have consistently made clear that they offer wholesale interconnection services not only to Time Warner Cable, but to any cable operator or other similarly situated customer. As MCI repeatedly told the South Carolina PSC, the wholesale telecommunications services it offers to Time Warner Cable are no different from the services it makes available to other, similarly

across networks"); *NYPSC Arbitration Order* at 5 ("While Sprint may act as an intermediary in terminating traffic within and across networks, the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the [ILECs]. Sprint meets the definition of 'telecommunications carrier' and, therefore, is entitled to interconnect with the [ILECs] pursuant to § 251(a).").

⁴⁰ See, e.g., *NARUC II*, 533 F.2d at 608.

⁴¹ See *Wireline Broadband Order* at ¶ 89 (confirming that broadband providers have the flexibility to offer transmission services as common carriers or private carriers).

⁴² See, e.g., *Nebraska PSC Arbitration Order* at ¶ 25 ("Although the Sprint witness testified that Sprint is willing to make its wholesale services available to others, it has not demonstrated by its actions that it is holding itself out 'indiscriminately' to a class of users to be effectively available directly to the public.").

situated customers.⁴³ Likewise, as Sprint has explained in several arbitration proceedings, it plainly qualifies as a telecommunications carrier because it “offers its interconnection and other services indifferently to all within the class of users consisting of cable companies and other entities who desire the services and who have comparable ‘last mile’ facilities to the cable companies.”⁴⁴ Indeed, many of the services Sprint and MCI offer to customers such as Time Warner Cable are available pursuant to tariff.⁴⁵

Such unequivocal evidence of a willingness to provide wholesale service as common carriers is more than adequate to demonstrate entitlement to interconnection under Section 251. The law requires nothing more than “hold[ing] [one’s] self out to serve indifferently all potential users,” as opposed to making individualized decisions about whether to serve particular customers.⁴⁶ The fact that Sprint and MCI memorialize arrangements with customers in contracts is irrelevant, contrary to the apparent belief of some state commissions.⁴⁷ The D.C. Circuit has made clear that a carrier does not “vitiolate its common carrier status merely by entering into private contractual relationships

⁴³ See, e.g., *Petition of MCI Metro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order on Arbitration, Docket No. 2005-67-C, at 11 (South Carolina PSC Sept. 8, 2005) (Tab 6, attached hereto) (reciting parties’ arguments).

⁴⁴ *Petition of Sprint Communications Company L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications Inc.*, Response of Sprint Communications Company L.P., Docket No. 31038, at 4 (Texas PUC Nov. 10, 2005) (Tab 9, attached hereto).

⁴⁵ See, e.g., Sprint Communications Company L.P., P.U.C. of Texas Local Exchange Tariff No. 1, available at <http://www2.sprint.com/tariffs>.

⁴⁶ *NARUC II*, 533 F.2d at 608-09.

⁴⁷ See *Nebraska PSC Arbitration Order* at ¶ 25 (citing Sprint’s “private contractual obligation to Time Warner” as a basis for denying Sprint’s request for interconnection with rural LECs).

with its customers.”⁴⁸ Similarly, the court has affirmed the Commission’s ruling that *customized service offerings that are “based on contractual negotiations with a single customer and are specifically designed to meet the needs of only that customer”* are not inconsistent with the fundamental nondiscrimination obligations applicable to common carriers.⁴⁹ Thus, as Sprint pointed out in the pending Texas proceeding, while particular customers will have individualized contracts based on their “purchase of different services (or different combinations of services),” Sprint is nevertheless a common carrier because each customer “is *offered* the same array of services, including both telecommunications services and non-telecommunications services, from which to choose.”⁵⁰

Based on such evidence of an indifferent “holding out,” some state commissions have recognized that MCI and Sprint function as common carriers insofar as they provide telecommunications services to Time Warner Cable.⁵¹ But the continuing refusal to uphold these carriers’ Section 251 interconnection rights in other states (including South Carolina and Nebraska) has made it necessary to litigate these issues on a state-by-state basis (and often through successive rounds in each state)—which in turn has delayed Time Warner Cable’s entry into numerous local service areas. Only a declaratory ruling by this Commission can ensure the national oversight and uniformity needed to eliminate the continuing impediments to local telephone competition.

⁴⁸ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁴⁹ *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 34 (D.C. Cir. 1990).

⁵⁰ *Petition of Sprint Communications Company L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Brazos Telecommunications Inc.*, Response of Sprint Communications Company L.P., Docket No. 31038, at 13 (Texas PUC Nov. 10, 2005) (Tab 9, attached hereto).

⁵¹ *See supra* at 8-9.

II. THE PRESENT UNCERTAINTY REGARDING THE CLASSIFICATION OF VOIP AS A “TELECOMMUNICATIONS SERVICE” OR “INFORMATION SERVICE” DOES NOT AFFECT WHOLESALE CARRIERS’ INTERCONNECTION RIGHTS.

As shown above, competitive telecommunications carriers are entitled to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of third-party service providers. Nevertheless, some state commissions appear to believe that the uncertain regulatory status of VoIP precludes competitive telecommunications carriers from obtaining interconnection to exchange third parties’ VoIP traffic, in particular. The South Carolina PSC, for example, stated that, “[u]nless and until the FCC does classify VoIP as a telecommunications service, VoIP providers do not have rights or obligations under Section 251” including the right to obtain indirect interconnection through a competitive carrier.⁵² That assertion plainly misapprehends the Act and the Commission’s precedent.

If a competitive carrier offers a *wholesale* telecommunications service—as MCI and Sprint offer to Time Warner Cable and its affiliates—the classification of the wholesale customer’s own *retail* service is irrelevant. The competitive carrier’s status as a requesting “telecommunications carrier” determines its entitlement to interconnection under Sections 251(a) and 251(c)(2), regardless of whether it sells transmission to another telecommunications carrier or to an information service provider. For example, it has long been established that Internet service providers (“ISPs”), which offer information services to their retail customers, are entitled to access the PSTN by

⁵² *SCPSC Arbitration Order* at 9.

purchasing telecommunications services from competitive carriers.⁵³ More recently, the Commission confirmed in the *Wireline Broadband Order* that facilities-based providers of broadband Internet access may choose to offer the underlying transmission service to ISP customers on a “common carrier” basis—which means that the provision of the transmission service qualifies as a “telecommunications service” even though it is provided to entities that in turn offer information services.⁵⁴ Thus, even assuming that VoIP is an information service, that classification of the retail service has no bearing whatsoever on a wholesale carrier’s entitlement to obtain interconnection.

III. DENYING VOIP SERVICE PROVIDERS ACCESS TO THE PSTN THROUGH ARRANGEMENTS WITH COMPETITIVE CARRIERS IS INCONSISTENT WITH THE ACT’S AND THE COMMISSION’S GOALS OF PROMOTING PROCOMPETITIVE POLICIES.

Even if the applicable statutory language were ambiguous and the precedent were unclear—and, as shown above, they are not—prohibiting Time Warner Cable from obtaining telecommunications services from a competitive carrier in order to launch a residential telephone service using a new and innovative technology such as VoIP would be patently unreasonable because it would undermine the Act’s unmistakably procompetitive purposes.⁵⁵ Banning this type of business arrangement is destructive of

⁵³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9158 ¶ 11 (2001).

⁵⁴ *Wireline Broadband Order* at ¶¶ 89-95.

⁵⁵ See 47 U.S.C. §§ 251-261 (titled “Development of Competitive Markets”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15499 ¶ 1 (1996) (“*Local Competition Order*”) (“[T]he 1996 Act requires telephone companies to open their networks to competition.”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (an agency must justify its interpretation of the Act “with reasons that do not deviate from or ignore the ascertainable legislative intent”).

competition in a very tangible way. Service providers like Time Warner Cable obtain telecommunications services from carriers such as Sprint and MCI because it allows them to obtain access to the PSTN and achieve market entry quickly and efficiently, a notion that this Commission has long supported in its interpretation of the competitive provisions of the Act.⁵⁶

In the specific context of VoIP services, the Commission has expressly contemplated that VoIP providers would obtain access to and interconnection with the PSTN through competitive telecommunications carriers. In its recent order addressing the 911 obligations applicable to VoIP-based services, for instance, the Commission made clear that interconnected VoIP providers could satisfy the requirement to deliver 911 calls via the Dedicated Wireline E911 Network “by interconnecting indirectly through a third party such as a competitive LEC,” demonstrating the Commission’s understanding and implicit approval of this type of business relationship.⁵⁷ Eliminating that mode of obtaining interconnection raises a significant—and potentially insurmountable—barrier to entry for new voice competitors. In South Carolina, for

⁵⁶ See, e.g., *Local Competition Order*, 11 FCC Rcd at 15598 ¶ 190.

⁵⁷ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196, FCC 05-116, ¶ 38 (rel. June 3, 2005); see *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, 19 FCC Rcd 4863, 4874 ¶ 12 (2004) (noting with approval that “Time Warner recently entered into an agreement with MCI and Sprint to use those companies’ networks to provide IP telephony to its cable subscribers and to interconnect their calls with the PSTN”); *id.* at 4911-12 ¶ 73 (noting that incumbent LECs must “interconnect directly or indirectly with the facilities and equipment of other [carriers]”); cf. *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3316 ¶ 14 (2004) (“The Commission has never required or even suggested that [an] information service provider must be the entity that provides or offers the telecommunications over which the information service is made available to its members.”).

example, the PSC ruled not only that Time Warner Cable may not obtain interconnection through MCI, but also that incumbent LECs are not obligated to port numbers to MCI if the numbers would be used to purchase Digital Phone.⁵⁸ Indeed, if it were not for the erroneous rulings that prompted Time Warner Cable to file this petition, tens of thousands of residential consumers in rural areas would be reaping the benefits of facilities-based voice competition this very instant.

Nor is the refusal to allow competitive carriers to obtain interconnection in order to sell wholesale telecommunications services to VoIP providers supported by any legitimate countervailing policy. So long as traffic is correctly metered and identified—as is all Digital Phone traffic originated and terminated on Time Warner Cable’s network—incumbent LECs should be indifferent as to whether traffic is delivered via a third-party service provider. In particular, where interconnection is sought pursuant to Section 251(a), rather than Section 251(c)(2)—thus eliminating any concerns about potential undercompensation as a result of TELRIC pricing—an incumbent LEC’s refusal to interconnect represents the epitome of anticompetitive conduct.

In sum, state commissions that have prevented Time Warner Cable from utilizing wholesale telecommunications services obtained from competitive carriers such as Sprint and MCI have violated the Act, Commission precedent, case law, and the public interest in promoting competition. This troubling trend of state commissions’ reaching such

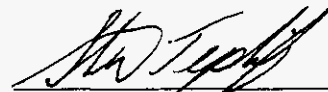
⁵⁸ See *SCPSC Arbitration Order* at 16. Just as the Commission has stated its clear expectation that VoIP providers can obtain interconnection through competitive LECs, it has explained that VoIP providers may “partner with a local exchange carrier (LEC) to obtain . . . telephone numbers.” *Administration of the North American Numbering Plan*, Order, CC Docket No. 99-200, 20 FCC Rcd 2957, 2959 ¶ 4 (2005) (granting a waiver to SBC Internet Services authorizing it to obtain telephone numbers directly from the North American Numbering Plan Administrator, in addition to obtaining numbers indirectly through a LEC).

clearly erroneous decisions makes a declaratory ruling by this Commission urgently necessary to remove substantial impediments to competition.

Conclusion

For the foregoing reasons, the Commission should declare that competitive LECs are entitled to interconnect with incumbent LECs for the purpose of exchanging traffic on behalf of VoIP providers.

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